

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
February 6, 2007 Session

**TARVIE GILBERT v. CHOO-CHOO PARTNERS, L.P.**

**Direct Appeal from the Chancery Court for Hamilton County**  
**No. 05-0315 Hon. W. Frank Brown, III., Chancellor**

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**No. E2006-01507-COA-R3-CV - FILED APRIL 9, 2007**

In this action, plaintiff alleged that he suffered two demotions with his employer due to his age. The Trial Judge granted the employer summary judgment, finding that there was merit in plaintiff's Complaint as to the first demotion, but the statute of limitations had run before the action was filed. As to the second demotion, the Trial Court held that the plaintiff failed to make out a prima facie case of age discrimination, because there was no showing that he was replaced by a younger worker. On appeal, we affirm the Trial Court's Judgment.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.**

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Grace E. Daniell, Chattanooga, Tennessee, for appellant.

Karen M. Smith and Maury Nicely, Chattanooga, Tennessee, for appellee.

**OPINION**

**Background**

On March 18, 2005, plaintiff filed his Complaint against Choo-Choo Partners II, LLC, Choo-Choo Partners, L.P., and Holiday Hospitality Corporation, alleging age discrimination in employment.

He explained that he was employed by defendants in 1998 as Director of Housekeeping, and that he maintained an excellent work record. He asserted that in March 2004,

when he was 67 years old, he was demoted from his position and replaced by a younger person. Further, that since that time, he has been changed from a salaried to an hourly employee, had his wages reduced, and had his managerial responsibilities taken away. He concluded that he had been damaged financially, and had also been damaged emotionally.<sup>1</sup>

Choo-Choo Partners II, LLC, filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, asserting that it was never plaintiff's employer, and was not a proper party defendant. Holiday Hospitality filed a similar motion. Both motions were granted by the Trial Court, because neither employed eight employees, and because Holiday was not plaintiff's employer.

The remaining defendant, Choo-Choo Partners, L.P., filed a Motion for Summary Judgment, asserting that no genuine issue of material fact existed with regard to plaintiff's claims. The defendant attached excerpts from plaintiff's deposition, wherein plaintiff stated that he was hired by defendant in 1998 as director of housekeeping (which was later renamed director of environmental services), and plaintiff testified that the assistant director reported directly to him, and that her name was Sharon Wigfall.

Plaintiff testified that he previously worked for the Sheraton Hotel, and that Jim Bambrey, Sr., was his supervisor there at some point, and that he also worked as director of housekeeping at the Read House and the Holiday Inn in Dalton.

Plaintiff testified that Jim Bambrey, Sr., became general manager of the Choo-Choo after plaintiff began working there, and that he was excited because they had a good working relationship at the Sheraton. Plaintiff testified to the events that transpired over time.

Excerpts from Jim Bambrey, Sr.'s deposition were filed, along with excerpts from Sharon Wigfall's deposition, as well as excerpts from other witnesses and affidavits.

Plaintiff filed a Response, asserting that he was told by Bambrey, Sr., that he was being replaced because they did not want to find him "dead in the hallway", and that he was never told he was an assistant director, but assumed that he was a floor supervisor. Plaintiff disputed that he did not perform managerial duties, and asserted that he did ordering, and disciplining/counseling employees.

Plaintiff's personnel record was filed, and it shows the effective date of plaintiff's demotion to be March 5, 2004, and states that plaintiff took a voluntary demotion to assistant director with a pay decrease. Plaintiff's personnel record also shows that his classification was changed to inspector on January 7, 2005, and that he was changed from salary to hourly. Plaintiff also filed an Affidavit, and it states that he is 68 years old, and that when he was demoted from director, it came as a complete surprise, and he had no idea that he was being demoted. Plaintiff

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<sup>1</sup>Defendants had the action removed to federal court, but it was later remanded to the state court.

stated that no one told him what his new title or job functions would be after the demotion, but the new director told the employees they did not have to call him “Mr. Gilbert” anymore.

Plaintiff stated that in January, 2005, he saw Mr. Bambrey, Sr., in the hallway and he told him he was going to have to cut his pay again, and that Mr. Bambrey later called him into his office and told him his title would be Trainer/Lead Supervisor, and asked him to sign a document accepting this position. Plaintiff stated that when he refused, Mr. Bambrey became upset.

Excerpts from the deposition of plaintiff’s wife were also filed, along with excerpts from Jon Kinsey’s deposition.

Defendant filed a Reply to Plaintiff’s Response, and asserted that the statute of limitations barred plaintiff’s claim because he was demoted on February 18, 2004, but did not file his Complaint until March 18, 2005. Defendants asserted that plaintiff’s claim that there was a continuing violation had no merit, because his demotion was a discrete act that started the running of the statute of limitations.

### **The Trial Court’s Judgment**

The Trial Court held a hearing on the Motion for Summary Judgment, and filed a Memorandum Opinion.

The Court found that plaintiff had to establish a prima facie case of age discrimination, and thus had to show that he was at least forty years old, was subjected to an adverse employment action, was qualified for the position, and was replaced by a younger person. The Court found that plaintiff had carried this burden, and so the burden then shifted to defendant to articulate a legitimate, non-discriminatory reason for the employment action.

The Court then discussed that the defendant had asserted that plaintiff’s claims were barred by the statute of limitations. The Court noted that Tenn. Code Ann. §4-21-311(d) provided that suit had to be filed within one year “after the alleged discriminatory practice ceases”. The Court held that based on U.S. and Tennessee Supreme Court precedent, the statute of limitations begins to run when the employee is given notice of the employment action. Citing *Weber v. Moses*, 938 S.W.2d 387 (Tenn. 1996).) The Court acknowledged that plaintiff was claiming a continuing violation, but found that the later incident constituting an adverse employment action occurred because of changes in the labor regulations, and that plaintiff’s age was not a factor. The Court further noted that plaintiff relied on Bambrey, Sr.’s earlier comments about not wanting to find plaintiff dead in the hallway, but found that there was no evidence that Bambrey, Sr., participated in the second demotion. The Court held that each demotion was a discrete act. Thus, plaintiff’s claim with respect to the first demotion was time-barred.

The Court found that with respect to the second demotion, plaintiff did not make out a prima facie case because he did not show that he was replaced by a younger person (he was not

replaced at all). The Court held that defendant had set forth a non-discriminatory reason for the demotion, and that plaintiff had not shown this to be pretext. The Court found that plaintiff's age was not discussed by anyone making this decision, and the only comment regarding age was made by someone who did not participate in the decision. Finally, the Court found that defendant employed a non-discriminatory method to determine who was exempt or not under the new labor regulations, and that plaintiff and seven other employees were reclassified. A summary judgment for the defendant was granted.

### **The Issue on Appeal**

The issue on appeal is whether the Trial Court erred in granting summary judgment to the defendant?

The Trial Court ruled that plaintiff's demotions were discrete acts, and that plaintiff's claim as to the first demotion was barred by the statute of limitations. Plaintiff argues that it was error for the Trial Court to grant summary judgment to defendant on this basis, asserting that 1) the statute of limitations had not run with regard to the first demotion, and 2) there was a continuing violation.

He insists that the statute of limitations had not truly run as to the date of his first demotion, because the demotion was not "effective" until his pay was reduced, which occurred at the pay period ending March 18, 2004, and for this reason the Complaint was timely filed on March 18, 2005. He admits, however, that he was informed of the demotion in February, 2004, and his personnel file shows a status change as of March 5. As the Trial Court correctly held, the statute of limitations began to run when plaintiff was given notice of the employer's decision, unless there was a continuing violation. *Weber v. Moses*, 938 S.W.2d 387 (Tenn. 1996).

In order to determine if there was a continuing violation, our cases address this issue. The continuing violation doctrine was first recognized by our Supreme Court in 1996 in *Spicer v. Beaman Bottling Co.*, 937 S.W.2d 884 (Tenn. 1996), wherein the Court stated:

Statutes of limitations for actions predicated upon employment discrimination are triggered and commence running on the occurrence of the alleged discriminatory act, and not at the time the last effects of the discriminatory act have been manifested.

The "continuing violation doctrine" was developed by federal courts in the late 1960s in the context of Title VII of the federal Civil Rights Act as an exception to the statute of limitations because initially, the statutory period within which suits had to be filed was very short and as a result, many potential claims were barred. This doctrine relieves a plaintiff from the burden of proving that the entire violation occurred within the limitations period. To establish a continuing violation, a plaintiff must show a series of related acts, one or more of which falls within the limitations period.

State courts adopting the continuing violation doctrine enumerate several factors that militate against strict application of the statute of limitations in the context of employment discrimination. First, they emphasize that Title VII is a remedial statute designed to eliminate discrimination and make parties whole. Second, they stress that employees are generally lay people and are unaware that they must act quickly or risk losing their cause of action. Often employees fear reprisal or turn to others for help, and in so doing, delay action on their cause until the statute has expired. Finally, and perhaps most importantly, those courts recognize that many discriminatory acts cannot be viewed as discrete incidents, and often unfold rather than occur, making it difficult to precisely pinpoint the time when they take place.

Although application of the continuing violation doctrine is not always clear and simple, there appears to be near universal agreement as to the abstract legal formulation of the doctrine. After a review of the relevant case law, we find persuasive the rationale supporting the continuing violation doctrine and adopt it in Tennessee. Courts have recognized, however, only two narrowly limited instances in which the continuing violation doctrine applies. The first category arises where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation, for example where an employer continues to presently impose disparate work assignment or pay rates between similarly situated employee groups. Key to establishing this exception is proof that at least one of the forbidden discriminatory acts occurred within the relevant limitations period.

The second category of "continuing violation" arises where there has been a longstanding and demonstrable policy of discrimination such as an established and repeated pattern of paying men more than women. To constitute such an established pattern, the plaintiff must clearly demonstrate some "overarching policy of discrimination," and not merely the occurrence of an isolated incident of discriminatory conduct.

*Id.* at 890.

The continuing violation doctrine was further treated by this Court, as follows:

The crucial issue [in determining if a continuing violation occurred] is whether the nature of the discriminatory acts were "not apparent when they were committed but became so when viewed in the light of the later acts."

The limitations period for filing suit when plaintiff instituted this action was contained in T.C.A. § 4-21-311(d), which required that suit be filed "within one (1) year after the alleged discriminatory practice ceases." Plaintiff's action was filed on June 29, 1994, and to establish that her suit was timely filed, she had to prove that a discriminatory act occurred on or after June 29, 1993. She has met this

requirement, in the form of the March 1994 demotion from the head of Customer Relations Department to work that can be described as clerical.

The question thus becomes whether the earlier violations can be "linked" to this 1994 demotion. The inquiry is whether the earlier acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations." To make this distinction, *Spicer* cited approvingly of the factors put forth in *Berry*

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

*Berry* at 981.

The importance of the third factor has been stressed, as a court examines:

What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.

*Frazier v. Heritage Federal Bank for Sav.*, 955 S.W.2d 633, 638 (Tenn. Ct. App. 1997).

Thus, pursuant to this analysis, we are required to determine if both demotions involved discrimination, which would connect them; the frequency of the acts; and the degree of permanence, i.e., did the first demotion have a degree of permanence which should have triggered plaintiff's awareness of his duty to assert his rights? In other words, would the plaintiff herein have had reason to believe that he was the victim of discrimination simply based on the first demotion, or were other acts needed to make him aware of the discriminatory treatment?

Plaintiff's allegations of discrimination focus on his first demotion. While the later demotion was obviously detrimental to plaintiff financially, his testimony stressed that he felt the greatest sense of loss from the first demotion when he was removed as director. Plaintiff asserted that he felt this was age-based discrimination at the time it happened because of the comments made by Bambrey, Sr., about their getting older and about not wanting to find plaintiff dead in the hallway.

The demotion clearly had a degree of permanence, and should have triggered plaintiff's awareness of his obligation to assert his rights. Plaintiff clearly had reason to believe (and did, in fact, believe) that he was the victim of discrimination based upon the first demotion alone.

As our Supreme Court has recently recognized:

perhaps the most important factor supporting use of the continuing violation doctrine in employment discrimination cases is the fact that "many discriminatory acts cannot be viewed as discrete incidents, and often unfold rather than occur, making it difficult to precisely pinpoint the time when they take place." As this statement implicitly recognized, the doctrine does not apply to "discrete incidents" or individual acts of discrimination. Rather, the continuing violation doctrine applies when the discriminatory acts take place over time.

*Booker v. The Boeing Co.*, 188 S.W.3d 639, 644 (Tenn. 2006).

Thus, the Supreme Court ruled that disparate pay based on sex was a continuing violation that had not yet "ceased" pursuant to the THRA, so the statute had not run on the plaintiff's claims. *Id.* The Court also recognized, however, that where the alleged discriminatory practice is a discrete act "such as termination, failure to promote, denial of transfer, or refusal to hire", each alleged act of discrimination must be evaluated independently to determine whether it occurred within the limitations period. *Id.*, quoting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

We conclude from this precedent, the Trial Court correctly determined that plaintiff's two demotions were discrete acts.<sup>2</sup> As such, plaintiff's claims with regard to his first demotion are time-barred, and the remaining question is whether the Trial Court was correct in granting summary judgment to defendant with respect to plaintiff's claims of discrimination regarding his second demotion.

The Trial Court found that plaintiff failed to make out a prima facie case of age discrimination with respect to his second demotion, because there was no showing that he was replaced by a younger worker. While this is true (plaintiff's slot as assistant director was never filled after he was demoted to trainer/supervisor), defendant concedes that plaintiff can also satisfy this prong of the standard by showing that he was treated differently from similarly situated co-workers under similar circumstances. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6<sup>th</sup> Cir. 1998)(ADEA case). Plaintiff did not meet his burden with regard to his second demotion, as the Trial Court found, because the evidence was that all of the employees at the hotel were analyzed to

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<sup>2</sup> Plaintiff attempts to overcome this holding by alleging that plaintiff was "passed over" for the director position each time that another individual was named director after his demotion. There was no showing that plaintiff ever re-applied for the director position, however, and thus it was not shown that he was "passed over" as he claims.

determine whether they were properly classified as salaried pursuant to new labor regulations. The analysis performed determined who would be classified as salaried or hourly. The proof was that several employees, including plaintiff, were reclassified based on analysis of their job duties under the labor regulations. The record establishes that plaintiff was not replaced by a younger worker, and he was not treated differently from his co-workers. Accordingly, this issue is without merit.

Moreover, if plaintiff could make out a prima facie case of discrimination regarding his second demotion, defendant provided a legitimate, non-discriminatory reason for the demotion, and plaintiff did not produce any evidence to show the same to be pretextual. As we have previously said:

an employee may demonstrate that an employer's proffered, non-discriminatory reasons for an adverse employment action are pretextual by revealing the "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's explanation. Of the three most common ways to undermine an employer's proffered reasons, one is establishing that the proffered reasons have no basis in fact. Proof that an employer's explanation is unworthy of credence is a persuasive way to prove unlawful discrimination.

*Frame v. Davidson Transit Organization*, 194 S.W.3d 429, 439 (Tenn. Ct. App. 2005).

We affirm the Judgment of the Trial Court in granting summary judgment to defendant and remand, with the cost of the appeal assessed to Tarvie Gilbert.

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HERSCHEL PICKENS FRANKS, P.J.